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No. 01-978

IN THE

Supreme Court of the United States

AUGUSTINE DAVID HENDERSON
AND GREGORY FRANCIS PHILLIPS

Petitioners,

vs.

FRAN P. MAINELLA,
Director of the National Park Service, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION

REPLY ARGUMENT

In its Brief in Opposition, the Government betrays obvious discomfort with *how* the Court of Appeals got to the conclusions it reached below.[1] Tellingly absent from the Government's brief is any ringing endorsement of the curt and poorly reasoned decision of the court of appeals, or of the appellate court's faithless rendering of the remedial Religious Freedom Restoration Act. A fair reading of the Government's Opposition leaves one to wonder whether there remains any distance further from the opinion below to which the Government could remove itself while yet maintaining a hold on its victory.

As we explain within, nothing in the Government's listless Opposition obviates the substantial reasons offered in the Petition for a Writ for granting review in this case. Indeed, the Government's distant and unenthusiastic treatment of the decision below serves as a telling signal for this Court, as silent hounds have done before.[2] In the Petition, we showed this Court

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1. "When needs he must, yet faintly then he praises;
Somewhat the deed, much more the means he raises:
So marreth what he makes, and praising most,
dispraises."

PHINEAS FLETCHER, THE PURPLE ISLAND, *canto vii.*

2. ARTHUR CONAN DOYLE, "Silver Blaze," in THE COMPLETE SHERLOCK HOLMES 335 (1927) (cited or quoted in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 591-92 and n.8 (1980) (Rehnquist, J., dissenting); *Jenkins v. Anderson*, 447 U.S. 231, 245 n.8 (1980); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 589 and n.20 (1982);

three strong reasons for granting review of the judgment below. *See* Pet. at 12-26. The Government's brief fails to undermine those grounds for granting review.

1. In their Petition, Henderson and Phillips identified two important federal questions – regarding the construction and application by courts of RFRA – that this Court has not previously addressed. *See* Pet. at 12-17.[3] Those questions relate to the propriety of judicial assays of the importance of a burdened act to a religious adherent.

In response, the Government asserts that the court below did not inquire into the question of centrality or importance of the

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(Stevens, J., dissenting); *Church of Scientology of California v. IRS*, 484 U.S. 9, 17-18 (1987); *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *Martinez v. Court of Appeal*, 528 U.S. 152, 159 and n.6 (2000); *INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001).

3. Those questions are:

> When assessing claims asserted under the Religious Freedom Restoration Act, Title 42 U.S.C. § 2000-bb *et seq.*, is a court required by the statute to inquire into the importance or centrality of a burdened practice to the claimant's faith in deciding whether a challenged government action imposes a substantial burden on the affected practice?

Pet. at i, and,

> Are federal courts competent to decide, in analyzing RFRA claims, whether a religious practice motivated by the faith of a claimant is important to or central to the faith of the claimant?

Id.

sale of t-shirts to Henderson and Phillips. Br. Opp. at 8-9. But that assertion is unfounded. The court below stated, "the amendments [of RFRA by RLUIPA] *did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists*." Pet. App. at 3a (emphasis added). Obviously, the court below concluded that it was appropriate for it to inquire into importance of a religious practice.

The Government's contentions on this point suffer from two defects. First, its representations are misleading, as is evident from the above-quoted language of the decision below. Second, its contention is insupportable, as is evidenced by the Government's failure to cite any language of the decision below that would give credence to its otherwise incredible claim. The Petition should be granted so that this Court may address these two important questions of federal law.

2. Henderson and Phillips identified a clear conflict among the Circuits. *See* Petition at 18-21. In its essence, this conflict is between courts that inquire into centrality or importance of a religious practice, (including, for example, the D.C. Circuit in this very case), and courts that have concluded that such inquiries are beyond the judicial ken, (such as the Second and Seventh Circuits). *See id.* In opposition, the Government gives a treatment to the conflict that passes strange, but fails to negate it.

The Government states:

> [t]he lower court decisions than that petitioners argue limit RFRA's protection to beliefs that are central to a religion and that are mandated, as opposed to motivated, by

> religion in, were decided before Congress enacted that clarifying amendment in 2000. Even if the courts had disagreed on the interpretation of RFRA before the recent amendments, there would be no reason for this Court to resolve any such disagreement in the wake of those amendments.

Br. Opp. at 13-14. The Government fails to take note of the fact that it is *the decision below in this case* that suffers the twin defects of being in conflict with the decisions of the Second and Seventh Circuits *and* of being unfaithful to amended RFRA. Instead, the Government asserts that the amendment of RFRA by the enactment of RLUIPA, *see* Pet. 13-14, cured the conflict and resolved the otherwise existing need for resolution in this Court. What the Government leaves unsaid, and perhaps hopes goes unnoticed, is that the conflict is alive and well, as is evidenced *by the decision below*, a decision that *post*-dates the amendment of RFRA.

The Government's approach is odd indeed. For the Government essentially ignores the decision below, which clearly fails to comport with amended RFRA, while it asks this Court to ignore a conflict in the Circuits, of which the decision below is a key part. And, on what basis does the Government contend that the conflict may be ignored? The Government contends that, because several of the *other*, earlier decisions evidencing the conflict arose prior to a clarifying statutory amendment, the conflict has been obviated by the amendment of RFRA.

The contention has a sweet simpleness to it, but it is without foundation. The Government's opposition, however, ignores the fact that the decision on which review is sought by Henderson

and Phillips followed after the amendment of RFRA (although the decision did not comport with the amendment). And it is the decision below that is squarely in conflict with the decisions of the Second and Seventh Circuit. *See* Pet. at 18-21.

The decision below is of a piece with those decisions predating the amendment of RFRA, see Pet. at 20-21 (discussing cases), in which questions of the importance of, or centrality of, a religious practice was treated by courts as falling within the judicial competence. *Unlike* the cases to which the Government refers, however, the decision below *postdates* the amendment of RFRA, and conflicts with the construction of RFRA employed in the Second and Seventh Circuits. Review should be granted so that this Court may resolve the conflict among the Circuits.

The Government's laconic treatment of the conflicting decisions of the Second and Seventh Circuit decisions also warrants brief comment.

Regarding *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996), all the Government can say is, "the court in *Jolly* recognized that courts may consider 'whether a claimant *sincerely* holds a particular belief.'" Br. Opp. at 14 (citation omitted, emphasis supplied in Government's Brief). But the validity of a judicial inquiry into sincerity is not at stake here, and has never been disputed between the parties. There simply is no dispute between Petitioners and Respondents over the capacity of judges (or fact finders) to assay the sincerity with which asserted beliefs are held. But, setting aside the inapposite sincerity question, the Government offers no point of contention that undermines Henderson's and Phillips' assertion that the decision below is in conflict with *Jolly*.

The Government's treatment of the decision in *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), is only slightly less terse and cryptic. Of *Mack*, the Government contends that the Seventh Circuit's decision "is susceptible to different interpretations." Br. Opp. 13. That *Mack* is "susceptible" to different interpretations does not resolve the conflict between it and the decision below. In fact, the Government has offered no construction of these cases that cures the conflict identified in the Petition. This Court should grant review so that the conflict in the Circuits may be addressed and resolved.

3. The Petition demonstrated the substantial deviation made by the court below from the standards this Court applies in religious freedom cases. *See* Pet. at 21-26. That deviation is relevant because Congress referred approvingly to, and adopted in RFRA, that line of decisions. *See* Title 42 U.S.C. § 2000bb-1(a) and (b), Pet. App. 47a.[4] In its Opposition, the Government fails to offer any ground on which the decision below could be constructed so as to be as consistent with, or faithful to, the decisions of this Court regarding the role of the judiciary in the resolution of religious freedom cases.

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4. As this Court knows, RFRA represents a judgment by the Legislative and Executive Branches that this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) accomplished an unwelcome and unjustified sea change in the treatment of claimed violations of the right to free exercise. Congress found that "the compelling test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *See* Pet. App. 47a. So Congress adopted the "compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," *see* Pet. App. 47a, and "guarantee[d] its application in all cases where free exercise of religion is substantially burdened," *see id.*

What the Government *does* do, however, is to concede that "it is not appropriate for a court to 'question the centrality of particular beliefs or practices to a faith.'" Br. Opp. at 12 (citation omitted). Having made that concession, the Government fails to explain how the court below adhered to that settled principle while it conducted a search through the Petitioners dogmas for the "importance" of selling t-shirts bearing religious messages. Obviously, the court of appeals directly questioned the centrality of that practice to the Petitioners, and expressed security in its understanding that such an inquiry was appropriate as part of determining the question of substantiality of burden. *See* Pet. App. at 3a. That approach cannot be squared with the decisions of this Court.

Neither the Government nor the court of appeals took Petitioners' claim at face value. Henderson and Phillips claimed that the ban on t-shirt sales substantially burdened the practice of selling t-shirts. They did not claim that the ban on the sale of t-shirts bearing religious messages substantially burdened the practice of *distributing* such shirts. Instead, they claimed that the ban on sale of such shirts was a substantial one because it completely prohibited the practice of selling the shirts. *See* Pet. at 4; *see also*, *e.g.*, Henderson Amended Complaint, Second Cause of Action.[5] It was only by recasting the relevant practice

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5. The Second Cause of Action alleged violations of RFRA in the following terms:

> 57. The distribution by sale of t-shirts bearing gospel messages is a religious practice compelled by Henderson's vocational calling to ministry of the gospel in the District of Columbia.
>
> 58. The ban on all sales of t-shirts on properties administered by the National Park Service National Capitol Region, including the

as *distribution* rather than *sales* that the Court (and now the Government) could get to the end game of blaming Henderson's and Phillips' difficulties on their poverty. Thus, ignoring Henderson's and Phillips' assertion that the sale of t-shirts bearing gospel messages was the relevant practice motivated by their faith, and not the free distribution of them, both the court of appeals and the Government inappositely concluded that the sales ban does not substantially burden the practice of distributing such t-shirts. Because the court below failed to comport its consideration of this case to the prior decisions of this Court, the Petition should be granted, the judgment below vacated, and the matter remanded with specific instructions for the further disposition of this matter.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

National Mall ind downtown Washington, constitutes a complete prohibition on Henderson's religious practice of selling t-shirts bearing gospel messages.

59. A complete prohibition on Henderson's religious practice of selling t-shirts bearing gospel messages is an undue and substantial burden on the exercise of Henderson's religion.

Henderson Amended Complaint ¶¶ 57-59.

Respectfully submitted,

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